BENJAMIN WONG PENG YAN

v.

GENTING BHD. & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[CIVIL SUIT NO. D5-22-1140-1990]
16 SEPTEMBER 1993

PRACTICE & PROCEDURE: Application to strike out writ and statement of claim - Basic relief prayed for already obtained in an originating motion application heard earlier - Whether present claim is subject to doctrine of res judicata.

AGENCY: Principle of election - Whether suit against agent wherein judgment was obtained bars principal from now being sued.

The present action was preceded by two other, one an originating motion by the plaintiff against the second defendant and another party (HSB), and the other action an originating summons application by plaintiff against the same two parties as in the present suit. The OS was subsequently withdrawn. In the originating motion matter, judgment in default had been obtained against the parties on 14 March 1988 and it was ordered there that plaintiff be reinstated as holder of 5 x 1000 shares in Genting Berhad. In the present action the same relief is prayed for together with the ancillary reliefs to register P as holder of all bonus shares, rights issue shares and dividends issued and damages against MIDF, the second defendant who is the agent of the first defendant and the registrar of its shares. The originating summons application which was withdrawn had prayed for essentially the same reliefs.

The facts were that the plaintiff had shares in Genting Bhd. which he had entrusted to another, a Mr. Chia. Chia had forged the plaintiff's signature on transfer deeds and the second defendant (who was not involved in the breach of trust) unwittingly transferred the said shares to HSB. The plaintiff's grievance presently is that the first defendant had, through the second defendant, its agent and registrar, transferred the shares to HSB without valid and registrable transfer deeds duly executed by plaintiff and were therefore in breach of its agreement with him.

The first defendant in this action applies to strike out the plaintiff's claim under O. 18 r. 19 and O. 92 r. 4 RHC 1980 read with s. 25(2) and para II of the Schedule to the Courts of Judicature Act 1965 contending that further to the grounds (a), (b) and (c) of O. 18 r. 19, "that *res judicata* applies from the order made on 14 March 1988" in the originating motion action relying to the same issues and cause of action. Counsel expounded that second defendant as agent of his client had been negligent in its duties and if his client as principal had an obligation towards plaintiff, this had lapsed on the final order obtained in the motion against second defendant. Plaintiff should have included the first defendant in his motion and sought the reliefs against them then instead of instituting a separate action now.

Plaintiff replied that the doctrine of *res judicata* did not apply as:

(1) the first defendant was not a party to the motion; the motion was against the transferee who forged the shares and the second defendant as registrar of the shares;
(2) that the causes of action were different;
(3) that the originating summons does not count as it was withdrawn.

Held:

[1] The originating summons application which has been withdrawn is not the courts' focus of attention as much as the originating motion wherein orders were made against the second defendant, the agent of the first. In the context of the agency and on the facts related, the principle of election applies - the aggrieved party, the plaintiff, must elect to sue either principal or agent. Having sued one (the second defendant in the originating motion application), the plaintiff cannot then sue the other, the first defendant who is the principal, on the same transaction. The liability of the first and second defendant are merged. The plaintiff had obtained the necessary relief in the motion - the first defendant's register had been ordered to be rectified by substituting plaintiff's name for HSB as holder of the shares. Plaintiff is now estopped from dragging in the first defendant in for this action for similar relief obtained in the motion. The prayers here only differ in the ancillary claim for bonus shares, rights issue shares and dividends from 9 April 1994 but the basic relief turns out to be the same as that obtained in the motion. Plaintiff cannot now be allowed to ask for ancillary prayers he had omitted in the originating motion.

[2] Caselaw has established that for the doctrine of *res judicata* to apply, the parties need not be the same. Relying on the facts of the present matter, the principles of principal and agent, the sequence of the three causes of action, the reliefs claimed in each, the parties in each and caselaw, the court finds that *res judicata* applies as the relief prayed for here is substantially the same as that prayed for and obtained in the originating motion.

[3] The writ and statement of claim discloses no reasonable cause of action, is scandalous, frivolous and vexatious and a blatant abuse of the process of the court and is ordered to be struck out.

[Application allowed with costs].

Cases referred to:
Choo Ah Kow v. Yeow Yew Thiam & Anor. [1988] 3 MLJ 48 HC / [1989] 1 MLJ 187 SC ***(refd)***
Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***
Government of Malaysia v. Dato' Chong Kok Lim [1973] 2 MLJ 74 ***(refd)***
North West Water Ltd. v. Binnie & Partners (a firm) [1990] 3 All ER 547 ***(refd)***
Mensa Mercantile (Far East) Pte. Ltd. v. Eikobina (M) Sdn. Bhd. & Ors. [1991] 2 MLJ 258 ***(refd)***
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor. [1975] AC 581 ***(refd)***
Townsend v. Bishop [1939] 1 All ER 805 ***(refd)***
Marginson v. Blackburn Borough Council [1939] 1 All ER 273 ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964
Rules of the High Court 1980, O. 18 r. 19, O. 21 rr. 3 & 4, O. 92 r. 4
Code of Civil Procedure, s. 11 (India)

Other sources referred to:
Bowstead on **Agency,** 15th Edn., p. 2256
Chitty on **Contracts,** Article 86, 25th Edn., Vol. II, p. 346
Halsbury's Laws of England, 4th Edn., Vol. 1(2), 16, p. 100
Stroud's **Judicial Dictionary**
The Doctrine of Res Judicata, George Spencer Bower, (2nd Edn., by Sir Alexander Kingcome Turner) p. 42, paragraph 46

For the plaintiff - Mubashir Mansor; M/s. Skrine & Co.
For the defendant - Rosli Dahlan; M/s. Allen & Gledhill

JUDGMENT

Hj. Abdul Malek bin Hj. Ahmad J:
Essentially, the only question to consider here is the issue of *res judicata,* defined in Stroud's **Judicial Dictionary** and reproduced here for convenience as:

Res Judicata

(1) The phrase "*res judicata*" is used to include two separate states of things. One is where a judgment has been pronounced between parties and findings of fact are involved as a basis for that judgment. All the parties affected by the judgment are then precluded from disputing those facts, as facts, in any subsequent litigation between them. The other aspect of the term arises when a party seeks to set up facts which, if they had been set up in the first suit, would or might have affected the decision. This is not strictly raising any issue which has already been adjudicated, but it is convenient to use the phrase *res judicata* as relating to that position (*Robinson v. Robinson* [1943] p. 43, 44 per Henn-Collins J.).

(2) This plea cannot be entertained but on the production of the record of the Court on which it is founded or on some valid reason being given for its non-production. See *The Annie Johnson,* 91 LJP 64.

The plaintiff had previously filed an originating motion D3-32-19-87 against Hongkong and Shanghai Bank (Singapore) Nominees Private Limited (hereinafter "HSB") and the second defendant where he had on 14 March 1988 obtained the following order:

> ... **It Is Ordered** that the register of members of the abovenamed company Genting Berhad be rectified by striking out the name of HSB therefrom as holder of 5 x 1,000 shares of the said company Genting Berhad under share certificates numbered 395081, 395082, 395083, 395084 and 395085 and by inserting in lieu thereof the name of the applicant herein as the holder of 5 x 1,000 of the said shares **And It Is Also Ordered** that the Registrar of the said Company, MIDF Consultancy and Corporate Services Sdn. Bhd. be and is hereby authorised to effect the necessary alterations in the said Register for carrying such Order into effect And It Is Lastly Ordered that notice of such rectification be given to the Registrar of Companies.

Subsequently, the plaintiff had filed an originating summons D4-24-160-89 against HSB, the first defendant and the second defendant asking for the following:

(a) that the Register of Members of Genting Berhad ("the company") may be rectified by striking out the name of HSB therefrom as holder of 5 x 1000 shares of the company

and all bonus shares in respect thereof issued by the company to HSB since 9 April 1984 and by inserting in lieu thereof the name of the plaintiff herein as the holder of 5 x 1000 shares of the Company and all bonus shares in respect thereof issued since 9 April 1984 and the Registrar of the Company be authorised to effect the necessary alterations to the said Register for carrying out such Order into effect and that notice of such registration be given to the Registrar of Companies and that the Registrar of the Company do issue to the plaintiff herein share certificates in the name of the plaintiff herein representing the 5,000 shares in the Company and all bonus shares in respect thereof issued since 9 April 1984;

(b) that HSB do pay to the plaintiff herein all dividends paid since 9 April 1984 to HSB by the Company in respect of the 5,000 shares and bonus shares thereof;

(c) that HSB do forthwith deliver up to the plaintiff herein share certificates representing all shares in the company taken up by HSB pursuant to rights issues of the company since 9 April 1984 in respect of the 5,000 shares together with duly executed transfer forms in favour of the plaintiff and that the plaintiff upon receipt of the said share certificates and transfer forms do pay to HSB the subscription costs, if any, of the said shares.

This had, however, been withdrawn on 20 August 1990.

These particular proceedings had been instituted by the plaintiff about a month earlier on 25 July 1990 and he had claimed as follows:

1. *Against the first defendant*

(a) an order that the first defendant take all action necessary to reinstate the plaintiff as registered holder of 5,000 shares in the first defendant ("the said shares") and issue to the plaintiff five shares certificates each representing 1,000 shares in the first defendant;

(b) an order that the first defendant take all action necessary to register the plaintiff as holder of all bonus shares of the first defendant issued since 9 April 1984 in respect of the said shares and issue to the plaintiff share certificates representing the said bonus shares;

(c) an order that the first defendant take all action necessary to register the plaintiff as holder of all shares pursuant to right issues of the first defendant since 9 April 1984 in relation to the said shares and issue to the plaintiff share certificates representing the said right issues shares and that the plaintiff do pay to the first defendant the subscription costs of the said right issues shares upon receipt of the share certificates;

(d) that the first defendant do pay the plaintiff all dividends declared by the first defendant since 9 April 1984 to the date of issue of all the share certificates above set out;

(e) alternatively damages.

2. *Against the second defendant* -

(a) damages

3. *Against the first and second defendants* -

(a) interest;
(b) costs;
(c) such further and other relief as this Honourable Court may deem just and proper.

By summons in chambers filed on 22 October 1991, the first defendant had applied to strike out the plaintiff's writ and statement of claim against the first defendant under O. 18 r. 19, and O. 92 r. 4, of the Rules of the High Court 1980 read with s. 25(2) of, and paragraph 11 of the Schedule to the Courts of Judicature Act 1964. Four grounds had been put forward for the application namely:

(a) that it discloses no reasonable cause of action;

(b) that it is scandalous, frivolous and vexatious;

(c) that it is an abuse of the process of the Court; and

(d) that *res judicata* applies from the order made on 14 March 1988 in Originating Motion D3-32-19-87 relating to the same issues and cause of action.

Outlining the facts of the case, learned Counsel for the first defendant had told the Court that the plaintiff held shares in the first defendant and had entrusted them to Chia Tay Huat (hereinafter "CTH") who was subsequently convicted in the Singapore District Court for breach of trust relating to the same shares. Thereafter, the plaintiff had commenced a series of court actions beginning with the Originating Motion D3-32-19-87 and followed by Originating Summons D4-24-160-89 and this suit respectively.

He went on to enunciate that the originating motion was against HSB and the second

defendant and the plaintiff had obtained the relevant judgment on 14 March 1988. Subsequently, the originating summons against HSB, the first defendant and the second defendant was filed but this had been withdrawn about a month after this present action was instituted. In these proceedings, the plaintiff had prayed for damages if the shares were not returned.

According to learned Counsel for the first defendant, the legal stand was that the second defendant had a responsibility towards the first defendant because as agent they had been negligent. Consequently, if the first defendant as principal owed a similar obligation as the second defendant to the plaintiff, that obligation had lapsed by virtue of the final order obtained by the plaintiff against the second defendant. He was of the opinion that the plaintiff should have included the first defendant in the originating motion and claim the relief sought for now at that stage instead of breaking up the matter the way he had done.

Learned Counsel for the plaintiff had rightfully reminded the Court as regards the principles of the doctrine of *res judicata*. For the doctrine to apply, he stated that the subject matter and the cause of action had to be the same, it should be between the same parties as a matter of fact and that they had to sue and be sued in the same capacities. In his view, *res judicata* did not apply in this situation as the first defendant was not a party in the originating motion which was against the transferee who forged the shares and the second defendant who was the Registrar of the relevant shares, and that the cause of action was different. He added that the relevant order on 14 March 1988 as regards the originating motion had no effect as the numbers of the missing share certificates were no longer in existence.

He further explained that the originating summons had been withdrawn on 20 August 1990 as the HSB was no longer the transferee and because the second defendant was no longer the Registrar of the first defendant. He reiterated that in cases involving the forged transfer of shares, the aggrieved party had the choice to sue the company that effected the transfer together with the transferee or take action against either one first as there was no legal requirement for all parties to be joined in one suit. In any case, he submitted that the first defendant was not a party in the originating motion, the causes of action were different and the withdrawal of the originating summons did not provide a defence to subsequent actions.

He further argued that from the statement of claim in this case, there was a reasonable cause of action and there was no unfairness to the first defendant who could seek indemnity from whoever presented the shares for registration. He concluded by saying that since this application was not reasonable, costs should be paid immediately if the application was dismissed.

Learned Counsel for the first defendant had replied that the cases cited by learned Counsel for the plaintiff were on forgery whereas the issue here concerned criminal breach of trust. As for costs, learned Counsel for the first defendant had retorted that if costs were forthwith ordered here for the dismissal of the application, then it should be paid forthwith for the plaintiff's Order 14 application and the subsequent appeal which had both been dismissed in favour of the first defendant.

Let us examine the facts as pleaded in the statement of claim. The plaintiff, a Singapore resident, was the registered owner of 5,000 shares in the first defendant. In February 1984, he had entrusted the relevant share certificates to CTH for safekeeping. Without the plaintiff's knowledge, CTH had fraudulently disposed of them and had forged the plaintiff's signature on five transfer deeds. Relying on the forged transfers, the second defendant, as registrar and agent of the first defendant, had transferred the said shares to HSB. CTH was subsequently convicted for criminal breach of trust of the said shares. The plaintiff contended that in breach of the agreement between them, the first defendant had transferred the said shares without a valid and registrable transfer deed duly executed by the plaintiff.

The relief sought for against the first defendant by the plaintiff in these proceedings is for the first defendant to reinstate the plaintiff as registered holder of the said 5,000 shares and to register the plaintiff as holder of all bonus shares, rights issue shares and dividends issued in respect of the said shares since 9 April 1984. It must be observed that apart from the question of bonus shares, rights issue shares and dividends issued since 9 April 1984, the same relief had been obtained in the judgment in default in the originating motion on 14 March 1988.

Tied in with the question of *res judicata* is the issue of agency and it is therefore worthwhile and appropriate to look into the question of principal and agent. It is not disputed that the second defendant is the registrar and agent of the first defendant. **Halsbury's Laws of England,** 4th Edn., Reissue Vol. 1(2) at p. 100 states:

> Where the other contracting party, whether in ignorance of the principal's existence or not, obtains a judgment against the agent, or, though he knows at the time when the contract is made, or discovers afterwards, who the real principal is, elects to look to the agent to the exclusion of the principal, the principal is discharged from liability to the third party and his liability cannot be revived. Such election is conclusively proved by obtaining judgment against the agent, even for part of the claim, unless the part for which judgment has been obtained constitutes a separate cause of action. Otherwise the question of election is one of fact, and depends on the circumstances of the particular case.

The second footnote on that page further clarifies that:

> This applies even where the judgment is unsatisfied: *Kendall v. Hamilton* [1879] 4 App Cas 504, HL.

Under Article 86 at p. 346 of Chitty on **Contracts,** 25th Edn. Vol. II it is provided that:

> (1) Where an agent enters into a contract on such terms that he is personally liable on it, and judgment is obtained against him on the contract, the judgment, though unsatisfied is, so long as it subsists, a bar to any proceedings against the principal, undisclosed or (semble) disclosed, on the contract.
> (2) (Semble), where an agent enters into a contract on such terms that he is personally liable on it together with his principal, or enters into a contract on behalf of an undisclosed principal, and the other contracting party, knowing or discovering who is the real principal, elects to pursue his rights against the agent, he is irrevocably bound by his election and cannot afterwards sue the principal on the contract. The question whether or not he has so elected is a question of fact.
> (3) Except as provided in this Article, the liability of the principal, whether disclosed or undisclosed, upon a contract made on his behalf is not affected by fact that the agent is personally liable on the contract.

Comment

> Rule (1). Judgment. Undisclosed principal. Where an agent contracts for an undisclosed principal, the third party can, on discovery of the facts, sue either the agent or the principal. It is however well established that if the third party obtains judgment against the agent, he can no longer sue the principal, even though he obtained judgment in ignorance of the fact that the agent had been acting for another, and so of his full rights, and even though the judgment is unsatisfied. The rule seems to be based on two arguments. The first is that there is only one obligation, which is merged in the judgment, as in the case of joint debtors. The second is the rather rough and ready one, that the liability of the undisclosed principal involves an interpretation of the facts inconsistent with that involving the agent's liability, and the third party cannot have it both ways.

The passage at p. 348 of the same text further sets out that -

> Some cases where the doctrine of merger has been held to operate should probably be explained by the proposition that where claims are made against principal and agent in the alternative, on the basis that the facts justify the liability of one or the other, but not both, judgment against one, unless set aside, involves *res judicata* in favour of the other.

In Bowstead on **Agency** 15th Edn., at p. 2256 are found the following excerpts namely:

> Where the agent, having made a contract in such terms that he is personally liable, has been sued on it to judgment, it appears that no action is maintainable against the principal on the same contract. ... It applies notwithstanding that judgment is set aside by consent. ... Where principal and agent are both liable, it is further said that the third party may lose his right to sue one by an unequivocal election to sue the other: this is again because the two rights are said to be inconsistent.

It is pertinent to refer to a local authority on this point which is *Choo Ah Kow v. Yeow Yew Thiam & Anor.* [1988] 3 MLJ 48. There, judgment in default of appearance was entered against the second defendant and consequent upon this judgment and relying on the doctrine of election, the first defendant applied to have the statement of claim against him set aside. The plaintiff contended that the doctrine of election did not apply as he had pleaded in the alternative that either one or both of the defendants return

the money paid by him to the second defendant pursuant to the agreement. It was held in allowing the first defendant's application that from the statement of claim, it was clear that the defendants were sued on the same cause of action, namely, breach of the sale and purchase agreement but as between them, the first defendant was sued as a principal and the second defendant his agent. It was further held that as the second defendant was an agent of the first defendant and when judgment in default was entered against the second defendant, the plaintiff's cause of action as against the first defendant had merged in the default judgment as a result of which the plaintiff could not justifiably maintain the same cause of action against the first defendant. Moreover, if actions can be brought and judgments recovered against the agent and afterwards the principal, there would be two judgments for the same debt or cause of action and this would be contrary to justice. Further, what was pleaded by the plaintiff in the alternative was an alternative remedy, that is, the return of the money paid, which did not introduce an alternative cause of action against any of the defendants.

This decision was, however, overturned by a majority decision in the Supreme Court in *Choo Ah Kow v. Yeow Yew Thiam* [1989] 1 MLJ 187 which ruled that -

> the material issue to be determined in this case is whether the liability of the first and second defendant was several or joint and not whether the remedies pleaded by the plaintiff were in the alternative. In this case although the second defendant (the attorney) and not the first defendant (the principal) had executed the sale and purchase agreement as a vendor, the obligation to transfer the property or, alternatively, to pay damages and to return the purchase money was in law imposed on the first defendant. By virtue of the power of attorney, the first defendant should be bound by the act of his attorney as if the sale agreement had been executed by him personally. Normally therefore, liability would be joint and not several, there being only one obligation. Performance by one would discharge the other and consequently, depending on the facts of the case the principle of election would apply. However, in the present case the facts as presented in the pleadings had rendered the applicability of the doctrine of election more complex than it should have been. The respondent denied that the second defendant was his lawful attorney or that he authorized the second defendant to sell the property. He contended that the second defendant was in fact a purchaser and the appellant a sub-purchaser of the property. He claimed that the sale and purchase agreement was not binding on him. In view of these averments by the respondent in his pleadings, the question whether this is a case of joint liability or not can be determined only after the trial of the issue raised by the respondent in his averments. If he succeeds at the trial to establish the averments, there would be no question of joint liability.

A perusal of the Supreme Court judgment would indicate that although it recognised the principle of election to sue either the principal or agent but not both, the principle could not apply on the facts of that case as the agency was disputed there and the matter had to go for trial. In consequence, the Supreme Court ruling must be distinguished as on the facts of our instant case, there is no dispute as to the agency. As a result, it is my finding that having sued the agent, the plaintiff here was not in a position to sue the principal for the same transaction.

Flowing from that, it is now necessary to cite two pertinent passages from **The Doctrine of Res Judicata** originally authored by George Spencer Bower with the 2nd Edn. by Sir Alexander Kingcome Turner. The first at paragraph 46 at p. 42 states:

> A judgment or order by default is *prima facie* just as much a judicial decision in favour of the plaintiff as any other judgment or order, whether the default of the defendant was in appearance to the writ or in pleading, or in appearance at the trial or hearing, or in prosecution of, or resistance to, an appeal.

The second footnote on the same page reads:

> In *Kerr v. Williams* [1885], 29 Sol. Jo. 681, C.A., the dismissal of an action on default of appearance at the trial was held to be a "judgment" which "operated as an estoppel to the plaintiff" (per Lindley LJ at p. 681).

In *Greenhalgh v. Mallard* [1947] 2 All ER 255, the Court of Appeal had ruled -

> Any series of concerted acts damaging to a plaintiff can give rise to only one cause of action for conspiracy. The unlawfulness resides in the fact of combination. A plaintiff who believes he has a cause of action in conspiracy must, therefore, decide whether he is going to say either

(i) that the purpose was unlawful but not that the means were unlawful, or
(ii) that the means were unlawful but not that the purpose was unlawful, or, that both purpose and means were unlawful.

If he has chosen to put his case in one of the first two ways, he cannot, thereafter, bring the same transactions before the Court, put his case in the other way, and say he is relying on a new cause of action. In such circumstances he can be met with a plea of *res judicata*, or the statement of claim may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the Court.

Somervell LJ in his judgment had this to say:

In *Green v. Weatherill* (4) [1929] 2 Ch. 221), Maugham J., quoted some observations by Wigram VC in *Henderson v. Henderson* (1) 3 Hare 114; I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

Maugham J., goes on to refer to the fact that that passage had been approved by the Privy Council in *Hoystead v. Commissioner of Taxation* [1926] AC 170). Applying that principle here, and perhaps, having particular regard to the second sentence in it, it seems to me that one could not find an issue or a way of putting a case which more clearly came within the principle as there laid down.

In the same case, Evershed LJ, had concluded his judgment by finding as follows:

The essence of any claim is the fact of combination. If, therefore, in any case conspiracy is alleged, the subject of the litigation consists, in my view, of the acts done in combination, and whether it is alleged that these acts, lacking justification in their object, have caused damage to the plaintiff, or that, notwithstanding a legitimate purpose, unlawful means have been employed and the plaintiff has been consequently damaged, both the cause of action and the damage flowing therefrom are the same in each case. In my view, therefore, and without the need for further analysis, if in one action for damages for conspiracy acts done in combination are alleged, it is an abuse of the process of the Court, and contrary to the principle that in the public interest there should be an end to litigation which may be regarded as an extension of the strict rule of *res judicata*, to rely in the second action on the same concerted acts, even though in the first action the claim was formulated on the basis of absence of justification in the end only, without regard, or particular regard, to the means, and in the second action the means are impugned as unlawful without challenge to the legitimacy of the end or purpose. For these reasons, in addition to those given by Somervell LJ., I think this appeal should be allowed.

Sharma J. had pragmatically pronounced the principles of *res judicata* in *Government of Malaysia v. Dato' Chong Kok Lim* [1973] 2 MLJ 74 by first saying -

In *Satyadhyan Ghosel and Ors. v. Sint Deorajin Dobi & Anor.*, the statement of the law on the subject is given thus:

The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

> The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court, whether the trial Court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

He had further stated -

> The rule is that a matter which might and ought to have been made a ground of attack or defence becomes a matter which was constructively in issue. A matter which might and ought to have been made a ground of attack or defence in the former application but which was not alleged as such a ground of attack or defence is for the purposes of the plea of *res judicata* deemed to have been a matter directly and substantially in issue in the former application, that is to say, though it may not have been actually directly and substantially in issue it is still regarded as, having been constructively, directly and substantially in issue. There can be no distinction between a claim that was actually made and a claim which might and ought to have been made. The plea of *res judicata* applies, except in special cases, not only to points on which the Court was actually required by the parties to form an opinion and to pronounce its judgment thereupon but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively *res judicata*. The rule of constructive *res judicata* is really a rule of estoppel. The question now raised has already been heard and finally decided.

For *res judicata*, the parties need not be the same. It had been so held in *North West Water Ltd. v. Binnie & Partners (a firm)* [1990] 3 All ER 547 that -

> where an issue had for all practical purposes been decided in a Court of competent jurisdiction the Court would not allow that issue to be raised in separate proceedings between different parties arising out of identical facts and dependent on the same evidence, since not only was the party seeking to relitigate the issue prevented from doing so by issue estoppel but it would also be an abuse of process to allow the issue to be relitigated. It followed that since the issue of negligence had already been determined against the consultant engineers in the first action they were estopped from denying negligence and further it would be an abuse of process if they were to be permitted to deny negligence. Their defence denying negligence would accordingly be struck out.

It would also apply if there is privity of interest between the defendants in both actions by the plaintiff as ruled by the trial Judge in *Mensa Mercantile (Far East) Pte. Ltd. v. Eikobina (M) Sdn. Bhd. & Ors.* [1991] 2 MLJ 258 who had said -

> It has been stated in the Supreme Court that even where *res judicata* is not strictly established or where estoppel per *rem judicatam* has not been sufficiently pleaded or made out but, nevertheless the circumstances are such as to render any reagitation of the question formally adjudicated upon a scandal and an abuse, the Court will not hesitate to dismiss the action. See the judgment of Abdoolcader SCJ in *Superintendent of Pudu Prison & Ors. v. Sim Kie Chon* [1986] 1 MLJ 494, wherein his Lordship considered that it would suffice in that regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty. Ltd. v. A-G for Queensland* [1979] AC 411.
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> Upon a perusal of the pleadings and the evidence led in the first action and the pleadings, affidavit evidence and argument of Counsel in this action and particularly in view of the fact that Mensa's chief executive officer knew that the equipment had been transferred to Edogawa and the director of the two companies were the same, I consider that there is privity of interest between the defendants in this action and Eikobina the defendants in the first action to the end that Mensa should be precluded from bringing this action and in this regard I place reliance on the cases referred to above. Mensa in answer to the defendants' application offered this Court no reason why it (Mensa) could not with reasonable diligence have claimed in the first action the relief it was claiming against the defendants in this action. On the evidence before me it was clear that Mensa at the time material to the first action knew of the *nexus* between Eikobina and the defendants in this action and by exercising reasonable diligence could have sought in the first action the relief it was claiming in this action. It seemed to me that Mensa having claimed but failed to obtain specific relief in the first action was seeking a proverbial second bite or the cherry in this action.

In *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor.* [1975] AC 581 the facts were these. The owners of a property borrowed money from the first respondent (the bank) which loan was charged upon the property. The owners defaulted on payment of the loan interest due to the bank and absconded. The bank, in exercise of its rights, sold the property to the appellant. The bank assigned the property, pursuant to the sale, to the appellant and the appellant borrowed money from the bank on the security of a mortgage of the property. The appellant defaulted on the payment of interest under the mortgage and the bank exercised its right of sale thereunder and sold the property to the second respondent. The appellant brought an action against the bank (No. 969 of 1969) claiming that the sale of the property to it was a sham; that the property had been conveyed to it as trustee for the bank and the mortgage was accordingly a nullity. The bank denied that the sale was a sham and counterclaimed for the loss suffered on the re-sale of the property to the second respondent. The Court dismissed the appellant's claim and upheld the bank's counterclaim. One month after that judgment the appellant brought an action against the bank and the second respondent (No. 534 of 1972) claiming that the sale by the bank to the second respondent was void or voidable as fraudulent in that the bank and the second respondent:

> were in fact essentially one certain interest and/or alternatively acting in concert with a common design calculated to obtain the ... property at a low price and to extinguish the plaintiff's interest therein.

The bank and the second respondent applied by summons for an order that the statement of claim be struck out as *inter alia* being vexatious, frivolous and/or otherwise an abuse of the process of the Court. The Judge held that the allegation of fraud and the voidability of the sale by the bank to the second respondent were matters which were available for litigation in action No. 969, and ordered that the statement of claim be struck out. The order striking out the statement of claim was affirmed by the full Court. On appeal to the judicial committee, it was held, dismissing the appeal, that there was no reason why a defence impugning the *bona fides* of the sale by the bank to the second respondent could not have been pleaded as a counterclaim to the counterclaim in action No. 969; that, accordingly, the doctrine of *res judicata* in its wider sense applied and it would be an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings.

Learned Counsel for the plaintiff had referred the Court to *Townsend v. Bishop* [1939] 1 All ER 805 where the plaintiff, who was the driver of a motor car belonging to his father claimed damages for personal injuries sustained by reason of a collision between that car and a motor lorry. The claim was based on the negligent driving of the lorry, and the defence was one of contributory negligence. The father had claimed damages in a previous action against the present defendant for damage to the motor car, and that action was founded on the same alleged negligence of the defendant, and the defence relied upon was a plea of contributory negligence in the same terms as those in the present action. That action was duly tried and judgment given. It was contended that the doctrine of *res judicata* applied in this action as, in driving the car, the son was acting as his father's agent. It was held that as the present action was not one between the same parties as those in the earlier action, the plea of estoppel failed, although the negligence and contributory negligence pleaded in each action were the same. However, I must emphasise here that I did not find favour with this finding for two reasons. Firstly, because of the overwhelming pronouncements in the other authorities cited earlier and secondly, by the unconvincing reasoning of the trial Judge himself as to how he arrived at his decision. For convenience, the conclusion of the relevant judgment states:

> It seems to be a very curious state of affairs, but, I understand it, and particularly as I read the cases to which I have been referred, and, amongst others, *Brunsden v. Humphrey* (2), it seems to me that there is no warrant for this proposition - namely, that, because the plaintiff in the present action has been found guilty of negligence in an action to which he was not a party in fact, and because, in the action in which his negligence was proved to the satisfaction of the Court, he was in fact the agent of the then plaintiff, that entitles the defendant in the present action to say that this matter has been litigated already. He cannot in my view properly say what he must say in order to succeed in this plea of estoppel - namely, that the matter now in issue is the same as that which was litigated in the County Court, and

that that was a decision in litigation between the same parties. Though it seems a curious state of affairs, I think that I must rule against this preliminary point, and say that, in my view, the facts stated on the pleadings and the facts which have been admitted here, quite frankly and properly admitted, of course, in the absence of the jury, do not amount in law to estoppel.

Learned Counsel for the plaintiff had also made reference to another case decided in the same year namely *Marginson v. Blackburn Borough Council* [1939] 1 All ER 273, but the facts there are distinguishable as although the two actions depended on the same facts, one was for damage to property and the other for personal injuries due to collision and also the plaintiff in the second action was the third party in the first. The Court of Appeal had held that -

(i) the plaintiff was estopped from bringing a personal claim for damages, as that point had been decided in the earlier litigation;
(ii) the plaintiff was not estopped from bringing his other claims, as he was making them in a representative capacity, whereas the third-party claims against him in the earlier case were against him in his personal capacity only;
(iii) in deciding the plea of *res judicata*, the Court is entitled to look at the judge's reasons for his decision, and is not restricted to the record.

It is most interesting to note that this was an appeal against the decision of Lewis J. who by sheer coincidence had also decided in *Townsend's* case less than a month later. It is more than apparent from these two cases that Lewis J. was not very much in favour of the doctrine of *res judicata*.

Although learned Counsel for the plaintiff had cited a number of excerpts from **Halsbury's Laws of England** 4th Edn. Reissue Vol. 16; I must stress that they are not exactly in support of his contention. On the contrary, the principles laid down fit quite nicely with the assertions of the first defendant. The relevant excerpts are at paragraph 973 at p. 857 which says -

> The most usual manner in which questions of estoppel have arisen on judgments *inter partes* has been where the defendant in an action raised a defence of *res judicata*, which he could do where former proceedings for the same cause of action by the same plaintiff had resulted in the defendant's favour, by pleading the former judgment by way of estoppel. In order to support that defence it was necessary to show that:
>
> (1) the subject matter in dispute was the same, namely that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit;
> (2) it came in question before a Court of competent jurisdiction; and
> (3) the result was conclusive so as to bind every other Court;

paragraph 974 at page 858 which states:

> the doctrine of *res judicata* is not a technical doctrine applicable only to records; it is a fundamental doctrine of all Courts that there must be an end of litigation. It will therefore be convenient to follow the ordinary classification and treat it as a branch of the law of estoppel. Where *res judicata* is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of facts. To decide which questions of law and fact were determined in the earlier judgment the Court is entitled to look at the Judge's reasons for his decision and his notes of the evidence, and is not restricted to the record; but, as a general rule, the Judge's reasons cannot be looked at for the purpose of excluding from the scope of his formal order any matter which, according to the issues raised on the pleadings and the terms of the order itself, is included in it;

and at paragraph 975 at page 860 which is reproduced as follows:

> In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of *res judicata* must show either an actual merger, or that the same point has been actually decided between the same parties.

Reference had also been made to O. 21 rr. 3 and 4 of the Rules of the High Court 1980 regarding the discontinuance of any action with the leave of the Court to the effect that, subject to any other terms imposed by the Court, it should not

be a defence to a subsequent action for the same, or substantially the same cause of action but it is proper to make it clear that we are not so concerned with the originating summons which had been withdrawn but more with the originating motion where the relevant order had been obtained.

To revert to the root of the problem, it is my finding that it was actually the fault and negligence of the plaintiff to hand over the relevant shares to CTH in the first place. This, and the subsequent forgery by CTH and the registration of the said shares in HSB by the second defendant was never on the instructions, and beyond the knowledge, of the first defendant. On this score, the first defendant should not be held to be liable and strictly speaking there appears to be no cause of action against them by the plaintiff.

That aside, if the fact that as Registrar of the first defendant's shares, the second defendant is the agent of the first defendant, then the liability of the first and the second defendant are merged. It must be pointed out at this juncture that the second defendant was not part of CTH's fraudulent plans. Be that as it may and for what it is worth, the plaintiff had actually obtained the necessary relief against the second defendant in the originating motion in that the relevant Register of members in the first defendant had been ordered to be rectified by substituting the plaintiff's name for HSB as regards the relevant shares.

As the shares were in the first defendant, it is certainly odd that they were never made a party in the originating motion which the plaintiff should have done. However, relying on the principles of principal and agent, that course of action was not quite necessary and the plaintiff had acted correctly in leaving the first defendant out but after making that option, he is now estopped in dragging the first defendant in for this action for relief similar to that he had obtained in the originating motion.

It cannot be argued that the relief is not the same in the originating motion, the originating summons and this action as basically the plaintiff only wants to be re-registered as the proper owner and holder of the shares he had lost by CTH's fraud. This he had obtained in the originating motion. The prayers here may appear different by the ancillary claim for bonus shares, rights issue shares and dividends from 9 April 1984 but the basic relief is the same as in the originating motion and to my mind, the plaintiff cannot now be allowed to ask for ancillary prayers he had left out in his originating motion.

Relying on the facts of the matter, the principles of principal and agent, the sequence of the three causes of action, the reliefs claimed in each, the parties in each, and the authorities cited, both from text books and case law, I can only come to the conclusion that *res judicata* applies as the relief claimed in the originating motion is substantially the same as the relief claimed here. Since the relevant relief has already been obtained, it is also my view that this writ and statement of claim discloses no reasonable cause of action, is scandalous, frivolous and vexatious, and is a blatant abuse of the process of the Court.

In the consequence, I had allowed the first defendant's application to strike out the plaintiff's writ and statement of claim against them with costs.